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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHNNIE TAYLOR HALL,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

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QUESTIONS PRESENTED

I. Whether Petitioner's guilty plea should have been accepted without questioning him on the record to determine that he understood he had the right not to testify.

II. Whether Petitioner's guilty plea should have been accepted without any on-the-record explanation of the charges.

III. Whether Petitioner's guilty plea should have been accepted without any showing on the record that he understood the maximum authorized sentence which could be imposed upon conviction.

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OPINION BELOW

The only opinion below was unreported in the Court of Special Appeals of Maryland, and was docketed as Johnnie Taylor Hall v. State of Maryland, No. 937, September Term, 1981. That opinion was filed on February 26, 1982, and is printed in the appendix.

Thereafter, no opinion was given by the Court of Appeals of Maryland, which is the state court of last resort, in denying certiorari on June 4, 1982.

JURISDICTION

The judgment sought to be reviewed was entered on June 4, 1982, when the Court of Appeals of Maryland denied the petition for writ of certiorari filed by Petitioner. Jurisdiction is conferred upon this Court by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides in part:

> No person shall ... be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ...

Section 1 to the Fourteenth Amendment to the Constitution of the United States provides in part:

> ...nor shall any State deprive any person of life, liberty or property without due process of law ...

STATEMENT OF THE CASE

On July 20, 1981, Petitioner, as part of a plea bargain, pleaded guilty to one count of driving while intoxicated in violation of Maryland law.

At the hearing during which the plea was entered, Petitioner was advised

that he was giving up the right to testify. However, no one advised him that he had the right not to testify.

Two charges were pending against Petitioner, namely, driving while intoxicated and driving over the posted speed limit. However, no explanation of the charges was made on the record. The only interchange was:

> Q. Do you understand the charges against you today?
>
> A. Yes, I do.

A. 5.

Nor was any inquiry made as to whether Petitioner understood the maximum authorized sentence which could be imposed. In its opinion, the Court of Special Appeals stated: "We agree ... that the court erred in not advising the appellant of the maximum possible sentence." A. 6.

At the conclusion of the hearing, Petitioner's guilty plea was accepted, and he was sentenced to one year of imprisonment with all but sixty days suspended, fined $250.00 and placed on five years supervised probation. A timely order for appeal was filed in the Court of Special Appeals of Maryland on August 19, 1981.

Since Petitioner had pleaded guilty in the trial court, the questions presented first were raised on appeal. A. 2. The first question presented here (self-incrimination) was decided on the basis of the federal constitution. A. 7-8. The second (nature of the charge) was decided on the basis of Henderson v. Morgan, 426 U.S. 637

(1976).[1] A. 4-5. The third (maximum possible sentence) was decided on the basis that "the plea bargain did include the maximum possible sentence," A. 6, a conclusion which Petitioner claims should not constitutionally be permitted to substitute for ascertaining on the record that Petitioner was advised of and understood the maximum possible sentence.

The Court of Special Appeals affirmed the conviction in an unreported opinion. A. 1, et seq. Petitioner then filed a timely Petition For Writ of Certiorari with the Court of Appeals of Maryland, which was denied on June 4, 1982. A. 9.

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[1] Petitioner claimed a violation of Maryland Rule 731 c which required "questioning the defendant on the record to determine that the plea is made voluntarily, with understanding of the nature of the charge ..." In its opinion, the Court of Special Appeals relied upon Henderson v. Morgan, supra.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW IS PART OF A WIDESPREAD CONFLICT AMONG BOTH STATE AND FEDERAL COURTS AS TO WHETHER THE RECORD MUST SHOW THAT AN ACCUSED UNDERSTOOD HE HAD THE RIGHT NOT TO TESTIFY BEFORE ACCEPTANCE OF HIS GUILTY PLEA.

The record is silent as to whether Petitioner understood that he had the right not to testify. The only relevant inquiry was the following:

> By Defense Counsel:
>
> Q. You are also giving up the right to testify. If you were not to testify the Court or the jury, the finder of fact, would not infer you were guilty from the fact you did not testify. Do you understand that?
>
> A. Right.

A. 7.

Nowhere does the record show that Petitioner was told he had the right not to testify. At most, the surrender of this right was implied by defense counsel's statement that the finder of fact

would not infer guilt if Petitioner did not testify.

In Boykin v. Alabama, 395 U.S. 238 (1969), this Court overturned a conviction, holding that a waiver of federal rights, including the right against self-incrimination, cannot be presumed from a silent record. Id. at 243. In Henderson v. Morgan, 426 U.S. 637, 645 N. 13 (1976), the Court noted that a plea may be involuntary "because the accused does not understand the nature of the constitutional protections that he is waiving ..." The issue here is whether the record must show that an accused entering a guilty plea was told he had the right not to testify and understood it. State and federal courts are divided on this issue.

In certain states Boykin has been read to require a specific on-the-record

enumeration and waiver of the defendant's constitutional rights. For example, the Supreme Court of California has stated that, under Boykin,

> ... each of the three rights mentioned -- self-incrimination, confrontation, and jury trial -- must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea... This does not require the recitation of a formula by rote or the spelling out of every detail by the trial court. It does mean that the record must contain on its face direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant. Because mere inference is no longer sufficient, the presence of an attorney can not alone satisfy these requirements.

In Re Tahl, 1 Cal. 3d 122, 131, 460 P.2d 449, 456 (1969).

Similar conclusions have been reached in Maleck v. State, 265 Ind. 604, 606, 358 N.E.2d 116, 118 (1976) (trial judge must "fully advise a defendant of his rights at the time a guilty plea is tendered, or have a record before him which demonstrates a full advisement"); Nachtigall v. Erickson, 85 S.D. 122, 128, 178 N.W. 2d 198, 201 (1970) ("... plea of guilty cannot stand unless the record in some manner indicates a free and intelligent waiver of the three constitutional rights mentioned in Boykin ... South Dakota judges can no longer assume that an accused represented by counsel has been informed of such matters and the judge must actively participate by 'canvassing the matter with the accused.' A silent record is not sufficient."); Brainard v. State, 222 N.W. 2d 711, 717 (Iowa 1974)

("...judge must by personal colloquy inform the defendant of his privilege against self-incrimination, his right to trial by jury, and his right to confront his accusers, and determine that he understands he waives these rights by pleading guilty.").

Other states, including Maryland, have disagreed. E.g., Hall v. State, A. 1, et seq.; Davis v. State, 278 Md. 103, 114, 361 A.2d 113, 119 (1976) (Boykin does not require trial courts "to specifically enumerate certain rights ... before accepting a defendant's guilty plea ..."); State v. Turner, 186 Neb. 424, 425, 183 N.W.2d 763, 765 (1971) ("...item-by-item review of constitutional rights on a guilty plea is a strained and too extreme construction" of Boykin); LoPiano v. State, 270 S.C. 563, 568, 243 S.E. 2d

448, 450 (1978) (Boykin does not "require that the trial judge direct the defendant's attention to each and every constitutional right and obtain a separate waiver of each."); State v. Colyer, 98 Idaho 32, 35, 557 P.2d 626, 629 (1976) (enumeration of rights not required).

The conflict among state courts of last resort has carried over into the federal arena. In United States v. Escandar, 465 F.2d 438, 441 (5th Cir. 1972), the court stated that before a plea of guilty can be accepted,

> the Trial Judge must personally address the Defendant, question him explicitly, explain the Constitutional rights involved and satisfy himself that the accused has "a full understanding of what his plea of guilty connotes and of its consequences." (citation omitted).

Conversely, in Stinson v. Turner, 473 F.2d 913, 915 (10th Cir. 1975), the

court stated that Boykin imposed no requirement that the three rights at issue be enumerated.

The issue is of obvious importance, and in view of conflicting state and federal court decisions, is worthy of review.

II. THE OPINION BELOW CONFLICTS WITH HIGH COURTS OF OTHER STATES REQUIRING A SHOWING ON THE RECORD THAT AN ACCUSED UNDERSTAND THE NATURE OF THE CHARGES AGAINST HIM BEFORE ACCEPTANCE OF HIS GUILTY PLEA.

It is undisputed that the trial court failed to ask Petitioner any questions on the record to determine that he understood the nature of the charges against him. The only inquiry in this regard was by defense counsel:

> Q. Do you understand the charges against you today?
>
> A. Yes, I do.

A. 5. No further efforts were made to explain or even enumerate the charges to Petitioner.

In Henderson v. Morgan, this Court, in reviewing a guilty plea, stated:

> ...such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea couldn't be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." (citation omitted).

426 U.S. at 645. The Court then stated:

> (Even without an express representation) it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

426 U.S. at 647. Whether this "presumption" satisfies the requirement that an accused receive "real notice" of the charge is unclear.

The Court of Special Appeals relied upon the foregoing "presumption" in affirming Petitioner's conviction. However, contrary to the ruling below, the Supreme Court of Pennsylvania has held:

> ...a valid guilty plea may not be accepted in the absence of a demonstration of defendant's understanding of the charges... In order to demonstrate that a defendant possesses such understanding, he certainly must be told more than just that he has been charged with murder or robbery, for example... Thus, for an examination to demonstrate a defendant's understanding of the charge, the record must disclose that the elements of the crime or crimes charged were outlined in understandable terms.

Commonwealth v. Ingram, 455 Pa. 198, 203, 316 A.2d 77, 80 (1974); accord, In Re Tahl, 1 Cal. 3d 122, 131, 460 P.2d 449, 456 (1969), quoted supra at 8. Cf. State v. Williams, 404 A.2d 814, 820 (R.I. 1979) (defense counsel's certification that defendant understood charges held sufficient).

Because there is a conflict between states on this issue, review is warranted.

III. THE OPINION BELOW CONFLICTS WITH OTHER STATE AND FEDERAL DECISIONS WHICH REQUIRE AN ON-THE-RECORD SHOWING THAT AN ACCUSED UNDERSTAND THE MAXIMUM POSSIBLE SENTENCE BEFORE ACCEPTANCE OF HIS GUILTY PLEA.

The Court of Special Appeals agreed that the trial "court erred in not advising ... [Petitioner] ... of the maximum possible sentence." A. 6. However, the court noted that the plea bargain, which was stated in open court prior to any questioning of Petitioner, "did include the maximum possible sentence." A. 6. Therefore, the court concluded that the conviction should be affirmed.

It is undisputed that whatever the plea bargain was stated to be, there is nothing on the record to show that Petitioner understood the maximum possible

sentence. Under Maryland law, this was "a fine of not more than $1,000 or imprisonment for not more than one year or both." Md. Ann. Code, TR § 27-101(i) 1977. In upholding the conviction, the Court of Special Appeals necessarily concluded that such an on-the-record showing was not required. This conclusion conflicts with numerous other state and federal court decisions.

In Boykin v. Alabama, this Court stated that trial judges should demonstrate "the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." 395 U.S. 238, 243-244. Although the Court did not expressly state that an accused had to be informed of the maximum possible sentence, cf. 395 U.S. at 245 N.7, lower courts have imposed

such a requirement. E.g., Cardenas v. Meacham, 545 P.2d 632, 633-34 (Wyo. 1976) ("There must be a record showing that the judge, in personally addressing the defendant, informed him of the maximum penalty for any and all crimes for which sentence is to be imposed in order that the court may determine the defendant had an 'understanding of the nature of the charge and the consequences of the (his) plea.'"); cf. In Re Guilty Plea Cases, 395 Mich. 96, 235 N.W. 2d 132 (1975) and State v. Mackey, 553 S.W. 2d 337 (Tenn. 1977).

The Delaware Supreme Court explained the rationale for this record requirement in Wells v. State, 396 A.2d 161 (Del. 1978):

> The maximum possible sentence provided by law for conviction of the offense charged is the most important "consequence of the plea." Accordingly, it must be spelled out clearly and accurately upon the record by the Trial Judge

> in order to assure that the waiver of important constitutional rights, which occurs when the defendant enters a guilty plea, is made "knowingly and intelligently."

396 A.2d at 162.

Lower federal courts also have subscribed to this rule. Lewellyn v. Wainwright, 593 F.2d 15, 17 (5th Cir. 1979) (because petitioner was ignorant of maximum authorized sentence, plea was found involuntary and invalid under the due process clause); cf. Hunter v. Fogg, 616 F.2d 55, 61 (2d Cir. 1980) ("We therefore conclude that the constitutional requirements of a state court guilty plea include informing a defendant of a mandatory minimum sentence (the lowest possible maximum)...").

Because the lower court's opinion conflicts with decisions in both state and federal courts, the issue merits review.

CONCLUSION

By reason of the foregoing, the Court is urged to grant this petition.

Respectfully submitted,

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